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IN THE CIRCUIT COURT FOR CALVERT COUNTY, MARYLAND

STATE OF MARYLAND	*	
vs.	*	CASE NO. C-04-CR-20-0036
JOSEPH MIGLIACCIO	*	

MEMORANDUM IN SUPPORT OF MOTION TO SUPPRESS BLOOD TEST AND BREATHALZER EVIDENCE AND REQUEST FOR HEARING

The Defendant, by and through his attorney, Robert C. Bonsib, Esq., respectfully requests this Honorable Court to suppress evidence in the above captioned matter and, as reasons in furtherance thereof, states as follows:

I. INTRODUCTION AND BACKGROUND

The Defendant, Joseph Migliaccio ("Migliaccio") has been indicted in the above captioned matter in a ten-count indictment in which he has been charged as follows:

Counts:

#1 Manslaughter by automobile (CL 2-209)

#2 Criminally negligent homicide by motor vehicle (CL 2-210(b))

#3 Homicide by motor vehicle while under influence of alcohol per se (CL 2-503)

#4 Homicide by motor vehicle while under the influence of alcohol (CL 2-503)

#5 Homicide by motor vehicle while impaired by alcohol (CL 2-504(a))

#6 Driving under the influence of alcohol per se (TA 21-902(a)(1)(ii))

#7 Driving under the influence of alcohol (TA 21-902(a)(1)(i))

#8 Driving while impaired by alcohol (TA 21-902(b))

#9 Negligent driving (TA 21-902.1(b)

#10 Speeding 55/40 (TA 21-801.1)

The States alleges that on Tuesday, October 29, 2019, at approximately 4:25 p.m. (1625 hours), in Calvert County, Maryland, that Migliaccio operated a motor vehicle while under the influence of alcohol when he struck and killed, Leah Christine Clark ("Clark"), a pedestrian who was walking on Dares Beach Road at the corner of Terrace Drive.

Migliaccio was a Calvert County Deputy who was off-duty and driving in his personal vehicle at the time of the accident.

The Immediate Aftermath of the Accident

Around 1625 hours, Dep. Boerum of the Calvert County Sheriff's Office ("CCSO") arrived on scene and sprinted to a wood line where a white female, Clark, was lying on the grass unresponsive. Migliaccio, was on top of the woman performing chest compressions. Dep. Boerum took over the chest compressions until EMS arrived on scene and relieved him.

Maryland State Police Trooper Davis arrived on scene while Dep. Boerum was performing CPR. Trooper Davis "applied [his] rubber medical gloves and grabbed [his] AED (#4) and ran toward an unconscious female subject lying face up on the grassy shoulder of the roadway."

An ambulance arrived on scene with EMS personnel who instructed Trooper Davis to continue CPR while they attached another AED on the subject. After the Calvert Advanced Life Support arrived on scene, Trooper Davis moved away and returned to maintain scene safety and security.

While CPR was being performed, Migliaccio walked toward Dep. Basham screaming "why did she run out in front of me." Migliaccio broke down in the middle of the road and had to be escorted by Dep. Basham to the closest cruiser, which was Rzepkowski's cruiser. Rzepkowski grabbed his equipment and ran to assist the victim but it was apparent she was deceased.

Dep. Boerum observed that Migliaccio "appeared to be in shock and was extremely emotional and upset." Migliaccio started crying and punching the cruiser several times yelling "why, why, why" becoming more upset.

Dep. Bradley arrived on scene at 1630. At that time, the fire department was attempting CPR on the victim and Migliaccio was "visibly distraught" screaming "Why did she run out in front of me? Why didn't she just stop?" Dep. Bowlan and Dep. Boerum were actively trying to get him to calm down.

F/Sgt. Selkirk notified Sheriff Evans of the accident. @1630 McDowell on scene Refused going to State police

Evidence of Alcohol

Dep. Boerum spoke to a female witness, Teresa Lou Walls, who advised that she witnessed the male driver, Migliaccio, throw a clear glass bottle that appeared to be a wine bottle out of his vehicle just prior to running over to provide CPR to the pedestrian he struck. Walls' vehicle was directly behind Migliaccio's vehicle when the accident occurred. Walls also stated that she smelled an alcoholic beverage on Migliaccio. Additionally, a male witness advised the he too observed Migliaccio throw a wine bottle to the edge of the wood line.

Rzepkowski informed F/Sgt. Selkirk of this information. F/Sgt. Selkirk asked Sgt. Basham if he observed an odor of an alcoholic beverage and Sgt. Basham nodded his head yes. Sgt. Selkirk approached Dep. Bradley and advised that there was a possibility that the driver was under the influence. Dep. Bradley recommended that the Maryland State Police be contacted to take over the investigation. McDowell said NO

Dfc. Rzepkowski advised Dep. Boerum that "there was enough units on scene that were on duty on scene and accident reconstruction was on scene, so they did not need [Boerum] there any longer." Dep. Boerum left the accident scene and drove to the CCSO.

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Calvert County Sheriff Mike Evans approached Trooper Davis and told him to report to the CCSO to assume an investigation for driving under the influence of alcohol. Trooper Davis spoke to State's Attorney Rappaport who advised that he learned that Migliaccio threw a bottle in the woods after the collision which was recovered and found to be an empty wine bottle.

Accident Reconstruction and Securing the Scene

Additional patrol vehicles arrived and they established scene security, shut down the road, and removed people.

Dep. Dean arrived on scene as support personnel for the CCSO Crash Reconstruction Team. The crash investigation was assigned to Cpl. Bortchevsky of the CCSO Recon Team

Transporting Migliaccio to CCSO

At 1639 hours, Deputy Bowlan arrived at the CCSO with Migliaccio. Migliaccio was not handcuffed, and exited the vehicle freely. Migliaccio was placed in the deputy's room.

Migliaccio sat on the floor and rolled over to his stomach distraught and Dep. Bowlan closed the door. Migliaccio was very apologetic for striking the female, he advised that she stepped into the roadway while he was driving and he struck her, he began crying again.

Det. Livingston and Det. Pounsberry entered the room and shut the door. Migliaccio was lying on the floor crying and distraught saying, "Why did she do that? Why did she do that." Migliaccio started punching the wall and Det. Livingston tried to calm him down. Det. Livingston asked Migliaccio what he was doing prior to the accident and Migliaccio replied that he was off duty working at home, doing yard work and working on equipment, when he decided to test drive a vehicle at a local car dealership. Migliaccio received a text message about an upcoming search warrant so he left the dealership to go home and grab his police vehicle. As he was driving home approaching Windsor grocery store, a female jumped out in front of his vehicle, he tried to stop

NO Body cam

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but couldn't. Migliaccio was completely distraught over the accident. Det. Livingston observed an odor of oil and a musky smell. Det. Pounsberry remained with Migliaccio until F/Sgt. Elliott arrived.

Migliaccio exited the room at 1655 hours and entered the Commanders Office area. Numerous deputies of various ranks were coming and going in the hallway and the Commanders Office area.

When Dep. Boerum arrived at CCSO, he observed that Migliaccio's supervisor, F/Sgt. Elliott was with Migliaccio so Dep. Boerum went back off duty.

Trooper Davis Arrives at CCSO

Trooper Davis arrived at the CCSO at 1722 hours. Trooper Davis was met by several CCSO deputies of various ranks. Trooper Davis entered the Commanders Office area at 1724 hours. At that time, Migliaccio was sitting on the floor inside of an interrogation room along with Cpl. Kreps, Sgt. Elliott, and Captain Jones.

Trooper Davis observed that Migliaccio's eyes were bloodshot and glassy and he smelled a strong odor of an alcoholic beverage emitting from Migliaccio's breath. Trooper Davis asked Migliaccio whether he wanted to perform any Standardized Field Sobriety Tests and Captain Jones interjected stating that Migliaccio would cooperate but not until his legal representation arrived. Migliaccio confirmed that he wanted to wait for his lawyer before making any decisions.

Trooper Davis stepped into the hallway at 1726 hours to speak to Cpl. Oles. A few minutes later, the FOP representative, Deputy Defelice, entered the room and had Migliaccio's lawyer, Shaun Owens, on the phone. Owens stated that he did not want Migliaccio to take any test until his lawyer representative Jonathon Scruggs arrived. Migliaccio confirmed that he wanted to do what his lawyer instructed him to do.

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Migliaccio's Arrest and Transport to CalvertHealth

At 1737 hours, Migliaccio was placed in custody. He was told to stand up, and was placed in handcuffs.

Sgt. Foote arrived at the CCSO at the same time that Migliaccio was being placed in handcuffs by Trooper Davis and escorted out for a blood test. Sgt. Foote advised F/Sgt. Elliott that he could help with whatever is needed, but Sgt. Foote received no response from him.

At 1740 hours, Trooper Davis exited the Sheriff's Office parking lot to transport Migliaccio to the CalvertHealth Medical Center in the MSP cruiser wherein Migliaccio was recorded by the in-car camera. Trooper Davis asked Migliaccio how the collision occurred and Migliaccio stated he was driving on Dares Beach Road when "she walked out in front of him in the roadway." No other questions were asked of Migliaccio.

Trooper Davis stopped by the Maryland State Police Prince Frederick Barrack "U" to pick up the blood kit. Trooper Davis arrived at the U Barrack at 1742 hours. Another trooper, "U32," initially set out to CalvertHealth to assist Trooper Davis at 1742 hours, but then he headed back to the accident area at 1802 hours.

The U Barrack is located at 210 Main Street, Prince Frederick, Maryland and is one-tenth of a mile or 1 minute, from the courthouse. No law enforcement official made any attempt to go to the courthouse to secure a warrant for the blood draw that day.

Trooper Davis arrived at CalvertHealth at 1748 hours and took Migliaccio into the hospital. When they arrived, they were seated in the hallway while waiting for the nurse to perform the blood draw.

Johnathon Scruggs arrived at the hospital and Trooper Davis told Scruggs that they would be doing a blood kit for Migliaccio for driving under the influence of alcohol. Scruggs informed

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Trooper Davis that Migliaccio would not be performing the SFSTs and that he would be refusing to submit to a blood sample. Trooper Davis told Scruggs that Migliaccio could not refuse to submit to a test, and therefore compelled Migliaccio to provide a sample.

At 1800 hours Nurse Sara Joy Smith arrived to collect the blood sample from Migliaccio. Migliaccio was asked to sign the consent form card in the blood sample box and Scruggs stated that Migliaccio would not sign the consent form. Two vials of blood were collected from Migliaccio at 1809 hours.

Transport back to CCSO and Internal Affairs Investigation

Migliaccio was placed back into handcuffs and transported to the Sheriff's Office in the cruiser. Migliaccio kept saying "Why did she run out in front of me. I tried to save her. Why." Migliaccio was released to Deputy Foote for an administration investigation. At the Sheriff's Office Migliaccio was in the presence of Deputy Foot, Jonathon Scruggs, and Deputy Defelice.

As part of the administration investigation, Migliaccio was ordered, without his consent, to submit to a breathalyzer test. At 1900 hours, Capt. Parrott requested that Sgt. Kreps administer an Administrative Breath Test on Migliaccio for agency purposes.

When Migliaccio returned to the CCSO he met with Professional Standards Bureau Captain Ireland. Sgt. Elliott was then advised that Migliaccio was suspended from his law enforcement duties and that he was to be transported to his residence to obtain his agency firearms and property. Sgt. Elliott took custody of these items.

II. SUMMARY OF THE ARGUMENTS

The State violated Migliaccio's United States constitutional, State constitutional/Declaration of Rights, and Maryland common law rights against unreasonable searches and seizures where there was no probable cause for the search, law enforcement failed to

obtain a warrant to obtain a blood sample from Migliaccio, Migliaccio did not consent to the blood draw, and no exception to the warrant requirement applied.

Additionally, the implied consent statute located in Transportation Article 16-205.1 is both unconstitutional on its face and as applied to Migliaccio. The results of the blood test must be suppressed and excluded from evidence at the trial in this matter.

Furthermore, the results of the breathalyzer must be suppressed and excluded as evidence at the trial of this matter as Migliaccio did not consent to the breathalyzer. Rather, he was ordered by his superiors at the Calvert County Sheriff's Office to submit to the breathalyzer test pursuant to Public Safety Article 3-104 which prohibits the admission of the results in any criminal proceeding against an officer.

III. THE STATE VIOLATED MIGLIACCIO'S RIGHTS UNDER THE UNITED STATES CONSTITUTION, THE MARYLAND DECLARATION OF RIGHTS, AND THE MARYLAND COMMON LAW AGAINST UNREASONABLE SEARCHES AND SEIZURES BY COMPELLING A WARRANTLESS BLOOD DRAW FROM MIGLIACCIO FOR WHICH THERE WAS NEITHER PROBABLE CAUSE NOR AN EXIGENT CIRCUMSTANCE.

The warrantless seizure of blood from Migliaccio at CalvertHealth was unlawful and violated Migliaccio's rights as guaranteed by the Fourth Amendment to the United States Constitution, by Article 26 of the Maryland Declaration of Rights, and by the common law.

The Fourth Amendment prohibits "unreasonable searches," and Supreme Court case law "establish[es] that the taking of a blood sample or the administration of a breath test is a search." *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2173 (2016); *Schmerber v. California*, 384 U.S. 757, 767 (1966). Therefore, warrantless forced blood draws are presumptively unreasonable under the Fourth Amendment. *Missouri v. McNeely*, 133 S.Ct. 1552, 1558 (2013).

The State must establish that it had probable cause to search Migliaccio and that exigent circumstances justified the warrantless search, otherwise, the State cannot overcome this presumption. *Birchfield*, 136 S.Ct. at 2184-86.

A. No Probable Cause to Arrest Migliaccio and Obtain Warrantless Blood Draw

At 1737 hours, Migliaccio was placed under arrest by Trooper Davis. The information that Trooper Davis had was the following.

Approximately one hour earlier, Migliaccio was the driver of a vehicle that struck and killed a pedestrian. Migliaccio was an off-duty officer who remained at the scene and performed CPR upon the victim until other help arrived.

Migliaccio was in great despair, sobbing in the middle of the road, punching a vehicle out of frustration, and at times, he was completely inconsolable. Migliaccio made statements about the victim running out in front of him. Witnesses had also observed that Migliaccio discarded an empty wine bottle after the accident.

Migliaccio was transported to the CCSO where he continued to be visibly upset and in tears. When Trooper Davis made contact with Migliaccio around 1722 hours, he observed that Migliaccio's eyes were bloodshot and glassy and that he smelled a strong odor of an alcoholic beverage emitting from Migliaccio's breath.

Maryland courts have said that "[b]loodshot eyes, in conjunction with the odor of alcohol emanating from the person, would ordinarily provide the police with *reasonable suspicion* that a driver was under the influence of alcohol." *Ferris v. State*, 355 Md. 356, 391 (1999) (emphasis added). However, reasonable suspicion does not rise to the level of probable cause to support a seizure and a search. Rather, reasonable suspicion only grants an officer the authority to request that a driver perform standardized field sobriety tests. It is then that the "field sobriety tests are

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used to determine whether probable cause exists for an arrest..." *Blasi v. State*, 167 Md. App. 483, 510 (2006).

In this case, Migliaccio did not perform any field sobriety tests. Putting the standardized tests to the side, Migliaccio did not appear unbalanced, disoriented, or have any difficulty following instruction or walking. In this case, it is clear that the bloodshot and glassy eyes were the result of an hour of sobbing and of Migliaccio being emotionally distraught as a result of the accident.

Maryland cases have made clear that "reasonable grounds" and "reasonable articulable suspicion" are one in the same, and are "not preponderance of the evidence or probable cause." *MVA v. Sanner*, 434 Md. 20, 33 (2013) (citing *Shepard*, 399 Md. at 254). Odor of alcohol on the breath, from very slight to strong, may meet the standard of reasonable suspicion or reasonable grounds that a person is impaired, but the Courts have never said that it meets the standard of probable cause. *See Sanner*, 434 Md. at 33, *MVA v. Spies*, 436 Md. 363, 374-75 (2013)

Consumption of alcohol is not synonymous with impairment or intoxication. Consumption of alcohol and driving is not *per se* illegal because there is no zero tolerance law for a driver over 21years of age who has no other restrictions on his license, which Migliaccio did not at the time of the accident.

Odor of alcohol plus an accident does not equate to probable cause. Therefore, Migliaccio's arrest was illegal and any evidence seized during the period of his unlawful arrest must be suppressed.

B. No Exigency Supporting Warrantless Blood Draw

Not only is the warrantless blood draw unconstitutional because it was not supported by probable cause, it is also unconstitutional because it was obtained without a warrant when there were no exigent circumstances justifying a warrantless blood draw.

1. Supreme Court Case Law

The focus of the exigent circumstances analysis is on "the delay necessary to obtain a warrant" and whether "under the circumstances, [it] threatened 'the destruction of evidence.'" *Schmerber v. California*, 384 U.S. 757, 770 (1966).

A focus on the delay attendant to an investigation runs afoul of courts' long-held aversion to tests that allow law enforcement to "create the exigency," as officers have complete control over whether and for how long to investigate an accident. *See Kentucky v. King*, 563 U.S. 452, 462-63 (2011).

Schmerber was the first case to consider the exigency exception to the warrant requirement for DWI cases. The Supreme Court held that the evidence of analysis of the petitioner's blood taken over his objection by a physician while the petitioner was in the hospital, after being arrested, was not inadmissible on the ground that it violated the petitioner's right under the Fourth Amendment to be free of unreasonable searches and seizures. 384 U.S. at 757.

In *Schmerber*, the petitioner was arrested at the hospital while receiving treatment for injuries sustained in an accident. He was arrested within two hours of the accident. *Id.* at 769. The Supreme Court acknowledged "[t]he importance of informed, detached and deliberate determinations of the issue of whether or not to invade another's body in search of evidence of guilt is indisputable and great[,]" but nonetheless, found the warrantless blood draw to be constitutional because the officer "might reasonably have believed that he was confronted with an

emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence'" because of the body's elimination of alcohol from its system, the elapse of time to take the accused to the hospital, and to investigate the scene. *Id.* at 770-71 (internal citations omitted).

However, the Supreme Court instructed that this was a very limited holding based upon the facts of the record:

> It bears repeating, however, that we reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.
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> *Id.* at 771.

Fifty years after *Schmerber* was decided, the Supreme Court clarified *Schmerber* in a very important way. In *Missouri v. McNeely*, 569 U.S. 141, 147 (2013), the Supreme Court was called upon to resolve the question of "whether the natural dissipation of alcohol in the bloodstream establishes a *per se* exigency that suffices on its own to justify an exception to the warrant requirement for nonconsensual blood testing in drunk-driving investigations." The Supreme Court rejected the argument that "the natural metabolization of alcohol in the bloodstream presents a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk driving cases." *Id.* The Supreme Court held that there is no *per se* exigency in every drunk-driving case based upon metabolization of alcohol in the system.

Instead, exigency is supposed to be reviewed on a case-by-case basis, looking at the totality of the circumstances:

> [I]t does not follow that we should depart from careful case-by-case assessment of exigency and adopt the categorical rule proposed by the State and its *amici*. In those drunk-driving investigations where police officers can reasonably obtain a warrant

> before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment **mandates** that they do so.
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> *Id.* at 153 (emphasis added).

McNeely likewise does not say that a court may find exigent circumstances where there is a delay due to an accident investigation. Indeed, "some delay between the time of the arrest or accident at the time of the test is inevitable regardless of whether police officers are required to obtain a warrant." *Id.* at 153. The *McNeely* Court noted that the presence of multiple officers at the scene could be one situation in which circumstances would not warrant a finding of exigency:

> Consider, for example, a situation in which the warrant process will not significantly increase the delay before the blood test is conducted because an officer can take steps to secure a warrant while the suspect is being transported to a medical facility by another officer. In such circumstance, there would be no plausible justification for an exception to the warrant requirement.

Id. at 153-54.

Lastly, *McNeely* recognized the technological advances that have streamlined the process of obtaining warrants, and, as such "are relevant to an assessment of exigency." *Id.* at 154.

The Supreme Court has "never retreated, however, from [ ] recognition that any compelled intrusion into the human body implicates significant, constitutionally protected privacy interests." *Id.* at 160. The *McNeely* Court held "that in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant." *Id.* at 165. There is no categorical exigency, and whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances. *Id.* at 156.

Since *Schmerber* and *McNeely*, the Supreme Court went one step further to protect the privacy interests associated with a warrantless blood draw of a suspected drunk-driver. In *Birchfield v. North Dakota*, 579 U.S. --, 136 S.Ct. 2160 (2016), the Supreme Court differentiated

what is required for police to conduct a breathalyzer test on a suspected drunk driver from what is required for a blood test.

The *Birchfield* Court determined "that the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving" because "[t]he impact of breath tests on privacy is slight, and the need for BAC testing is great." 136 S.Ct. at 2184. However, the Court "reach[ed] a different conclusion with respect to blood tests." *Id.* This is because "[b]lood tests are significantly more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test. Respondents have offered no satisfactory justification for demanding the more intrusive alternative without a warrant." *Id.*

The *Birchfield* Court concluded that:

> [B]ecause breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, we conclude that a breath test, **but not a blood test**, may be administered as a search incident to a lawful arrest for drunk driving. As in all cases involving reasonable searches incident to arrest, a warrant is not needed in this situation.

136 S.Ct. at 2184 (emphasis added).

As a recap for blood tests: blood tests are inherently more invasive → probable cause is required → a warrant or exigent circumstances is required → dissipation of alcohol in the bloodstream and/or investigating and accident is not a *per se* exigency. It is with this background that this Court must now consider the facts at hand.

2. Analysis of Migliaccio's Case

This Court must focus on whether the State can demonstrate that the police could not reasonably obtain a warrant, not on how severe the accident was. Even if an officer's investigation of a "serious" accident lasts for an hour, the availability of other officers minutes into the investigation, or the presence of medical personnel to treat injuries, could significantly reduce the

delay necessary to obtain a warrant, compared to a lone officer who discovers an intoxicated driver during a midnight traffic stop not involving any accident, where the delay necessary to obtain a warrant could be substantial if there is no magistrate or other officer available. The reason that suspected drunk-driving cases must be looked at on a case-by-case basis, is because an exigency in one circumstance may not be an exigency in another, when viewing the totality of the circumstances.

Migliaccio's accident is not one that occurred in the middle of the night, on a weekend, on a rural road far from rescue workers, police stations, hospitals, or the courthouse. Migliaccio's case is not one in which a lone officer came upon an accident in which he solely had to perform life-saving techniques to multiple victims, while investigating the crash scene, while interviewing witnesses, while speaking to the defendant, while trying to obtain a warrant, all within a sufficient amount of time to make a blood draw meaningful.

By contrast, the accident in Migliaccio's case occurred on a Tuesday afternoon at 4:25 p.m., on a road that was in the middle of town within minutes of the CCSO, MSP Barracks, District and Circuit Courthouses, and hospital.

Available Personnel

An abundance of officers and medics were available in this case as outlined below:

CCSO personnel

1. Basham
2. Boerum
3. Bortchevsky
4. Bowlan
5. Buckmaster

6. Burgraff
7. Bradley
8. Childress
9. Crump
10. Dean
11. Defelice
12. Deleon
13. Elliott
14. Evans
15. Foote
16. Funchion
17. Hardesty
18. Ireland
19. Jacobs
20. Jones
21. Kelly
22. Kreps
23. Livingston
24. Moran
25. Oles
26. Phelps
27. Pounsberry
28. Rector

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29. Rzepkowski

30. Selkirk

31. Potential other unnamed officers from video/still shots

Emergency Responders

1. Fire department
2. EMS
3. Calvert Advanced Life Support

Maryland State Police

1. Trooper Davis
2. "U32"

State's Attorneys' Office

1. State Attorney Rappaport

Location of All the Relevant Establishments

The courthouse, CCSO, MSP, accident scene, and hospital were all within minutes of one another. The courthouse was 0.1 miles or 1 minute from the Maryland State Police Barrack where Trooper Davis stopped to get the blood kit and had colleagues working. The courthouse was 0.5 miles or 3 minutes from the Calvert County Sheriff's Office where Trooper Davis interviewed Migliaccio who was surrounded by various other law enforcement officers. The courthouse was 1.9 miles or 6 minutes from CalvertHealth Medical Center where Trooper Davis sat and waited for the blood to be drawn, which occurred relatively soon after their arrival at the hospital. State's Attorney Rappaport, with whom Trooper Davis was in communication with, and by whom he was ordered to perform the blood draw, worked within the courthouse.

Zero Attempt Made to Secure a Warrant

Deputies Boerum and Foote were actually told they could go off duty or resume other tasks when they requested whether their assistance in this investigation was needed. Trooper "U32" was available to assist as well, yet he was directed to CalvertHealth and then the scene of the accident, rather than to try to obtain a warrant.

Within minutes of the accident occurring, it was suspected that alcohol may have been a factor in the crash. State's Attorney Rappaport was contacted two different times regarding how to handle the suspected DUI investigation, and yet no law enforcement officer, nor prosecutor, made any attempt within the next hour and forty-four minutes to obtain a warrant.

Additionally, there is no information that Nurse Smith was unable to standby at 1809 hours to wait for the officers to obtain a warrant before drawing the blood.

There is absolutely no information that ***any*** measure was taken to try to obtain a warrant at that time. There was no instruction by State's Attorney Rappaport, Trooper Davis, Sheriff Evans, or any of the others leading the investigation to make any attempt to obtain a warrant. An exigency does not exist merely because the State does not want to go to the trouble of trying to obtain a warrant.

No Real Exigency, Only an Artificially Created One

At 5:38 p.m., one hour and thirteen minutes after the accident, Trooper Davis spoke to State's Attorney Rappaport on the phone and was advised by State's Attorney Rappaport that there is a two-hour time limit for a blood draw. Trooper Davis immediately placed Migliaccio in custody, stopped at the barrack to obtain a blood kit, and drove him to the hospital where they arrived at 5:48 p.m.

While waiting for a nurse, Trooper Davis told Migliaccio's counsel at the hospital that Migliaccio could not refuse to submit to a test based upon the nature of the accident.

At 6:00 p.m. Nurse Sara Joy Smith arrived to collect the blood sample from Migliaccio and by 6:09 p.m. two vials of blood were collected from Migliaccio.

It is obvious that the only concern that Trooper Davis and State Attorney Rappaport had on their mind that day was an artificial exigency created by statute requiring blood to be drawn within two hours. Only after Trooper Davis hung up the phone with State Attorney Rappaport did he arrest Migliaccio and make a beeline for the hospital.

Transportation Article ("T.A.") § 16-205.1(a)(2) is the "implied consent" provision in which:

> [A]ny person who drives…a motor vehicle on a highway…in this State is deemed to have consented, subject to the provisions of §§ 10-302 through 10-309, inclusive, of the Courts and Judicial Proceedings Article, to take a test if the person should be detained on suspicion of driving…while under the influence of alcohol, while impaired by alcohol…

T.A. § 16-205.1(c)(1) applies to testing of persons involved in a motor vehicle accident:

> If a person is involved in a motor vehicle accident that results in the death of…another person and the person is detained by a police officer who has reasonable grounds to believe that the person has been driving…while under the influence of alcohol, while impaired by alcohol,…the person shall be required to submit, as directed by the officer, to a test of:
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> (i) The person's breath to determine alcohol concentration;
> (ii) One specimen of the person's blood, to determine alcohol concentration…or
> (iii) Both…

If a person is directed to be tested for alcohol in the blood by a police officer pursuant to T.A. § 16-205.1, then the provisions of the Courts and Judicial Proceedings Article (C.J.P.) §§ 10-301 through 10-309 shall apply. C.J.P. § 10-303(a)(2) states that "For the purpose of a test for

determining alcohol concentration, the specimen of breath or blood shall be taken within 2 hours after the person accused is apprehended."[1]

Contrary to the time limits imposed by C.J.P. 10-303, the Supreme Court in *McNeely* said that there is no *per se* rule that the natural dissipation of alcohol from the bloodstream always constitutes an exigency justifying the warrantless taking of a blood sample. "The context of blood testing is different in critical respects from other destruction-of-evidence cases in which the police are truly confronted with a 'now or never' situation." *McNeely*, 569 U.S. at 153 (internal citation omitted). This is because BAC evidence from a drunk-driving suspect naturally dissipates over time in a gradual and relatively predictable manner, and some delay is inherently built into the search because the driver has to be transported to a medical facility to obtain the assistance of a technician to perform the draw. *Id.*

Where warrantless searches have been potentially reasonable have been in instances where "there is compelling need for official actions **and no time to secure a warrant**." *McNeely*, 569 U.S. 141, 148-49 (2013) (citing *Tyler*, 436 U.S. at 509) (emphasis added). "Nothing prevents the police from seeking a warrant for a blood test **when there is sufficient time to do so** in the particular circumstances..." *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2184 (2016) (citing *McNeely*, 569 U.S. --, 133 S.Ct. at 1568) (emphasis added).

"In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." *McNeely*, 569 U.S. at 152-53 (citing

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[1] The statute does not define "apprehended" but the Court of Appeals in *Willis v. State*, 302 Md. 363, 376 (1985) found that:

> [A]n accused is "apprehended" when a police officer has reasonable grounds to believe that the person is or has been driving a motor vehicle while intoxicated or while under the influence of alcohol and the police officer reasonably acts upon that information by stopping or detaining the person.

McDonald v. United States, 335 U.S. 451, 456 (1948) ("We cannot...excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made [the search] imperative.").

Here there was plenty of time to secure a warrant. The *McNeely* Court envisioned the situation in Migliaccio's case: "Consider, for example, a situation in which the warrant process will not significantly increase the delay before the blood test is conducted because an officer can take steps to secure a warrant while the suspect is being transported to a medical facility by another officer. In such a circumstance, there would be no plausible justification for an exception to the warrant requirement." *Id.* at 153-54.

There is no reason that within minutes of the accident occurring when alcohol was a suspected factor, to the first time that State's Attorney Rappaport was consulted, to the second time that State's Attorney Rappaport was consulted, with three divisions of the executive branch and dozens of law enforcement personnel working on this case, that one person could not have assisted in obtaining a warrant.

The "two-hour" window is an artificial exigency created by the statute. The clock does not even necessarily begin ticking at the time that the accident happens, which is presumably the clock that Trooper Davis and State Attorney Rappaport were working off of. Rather, the clock begins ticking as soon as a person is *apprehended* based upon reasonable grounds to believe a person was driving under the influence of alcohol and an officer acts upon that information by detaining them. *Willis*, 302 Md. at 376.

Maryland Courts have allowed the admission of blood draws acquired three or four hours after the accident. *See Willis*, 302 Md. at 367-68 (upholding admission of blood draw almost four hours after accident but within two hours of apprehension); *State v. Moon*, 291 Md. 463, 474

(1981) (finding no prejudice in admitting sample that was withdrawn more than two hours after the incident in question); *Brice v. State*, 71 Md. App. 563, 583 (1987) (even if there had been a violation of the two-hour rule, the results of a delayed test would not have worked to the prejudice of the accused, but only to his advantage).

Migliaccio was not apprehended until 1738 hours or 5:38 p.m. after he had been sitting at the CCSO for an hour with precious minutes ticking away that could have been used to secure a warrant. Trooper Davis would have had at least two hours from that time to attempt to secure a warrant. Even if the clock started ticking at the time of the accident, at 1625 hours or 4:25 p.m., the Maryland cases cited above demonstrate that the results still would have been admissible even if the blood had been obtained after the two-hour mark. In this case, this Court will never know how long it would have taken to try to obtain a warrant because nobody made any attempt to secure one.

Trooper Davis wrote a report indicating why he did not obtain a warrant: "Due to the late change over for the investigation, transport to the hospital, and waiting for a nurse to collect the blood sample, we were unable to obtain a search warrant for the Migliaccio's blood sample."

This justification belies the facts and the case law.

"Due to the late change over for the investigation": What late changeover? What does that have to do with any of the other officers who were available and were assisting at that time? What does that have to do with suspicion of alcohol within minutes of the accident at 4:25 p.m. What efforts were taken between 4:25 p.m. and 6:09 p.m. to obtain a warrant? There were reasonable grounds for the test but no effort by the police or the prosecutor to see if the facts supported probable cause by a neutral and detached magistrate.

"[T]ransport to the hospital": There was an 8 minute delay to transport Migliaccio to the hospital. Davis left CCSO with Migliaccio at 5:40 p.m. Davis arrived at CalvertHealth with Migliaccio at 5:48 p.m. An 8 minute delay to transport Migliaccio to the hospital can hardly be deemed an exigent circumstance. In fact the *McNeely* Court said "some delay between the time of the arrest or accident at the time of the test is inevitable regardless of whether police officers are required to obtain a warrant." *McNeely*, 569 U.S. at 153. Thus, this typical delay to transport to the hospital is not sufficient to trigger the exigent circumstance exception to the warrant requirement. Furthermore, Trooper Davis made no attempt to ask for assistance in obtaining a warrant while he was transporting Migliaccio. Trooper "U32" had been requested to assist at the hospital, but did not even make it there, instead, he was re-routed to the accident scene an hour and a half after it occurred.

"[W]aiting for a nurse to collect the blood sample": Trooper Davis arrived at hospital at 5:48 p.m. The nurse came into the room at 6:00 p.m. There was 12 minute delay. During that delay Trooper Davis made no attempt to have anyone else get a warrant. The nurse did not indicate that she could not wait to conduct the blood draw, or that there would be no other available nurse. When Trooper Davis left the CCSO after speaking with State's Attorney Rappaport, he knew that he was not going to make any attempt to obtain a warrant.

Looking at the facts and circumstances of this particular case, there is no basis for this Court to find that an exigency existed such that there was no time to obtain a warrant for the blood sample in this case. This Court should not condone a manufactured exigency where there were ample officers and prosecutors available within a small town where everything was within minutes of each other to secure a warrant. Most of the officers literally sat around at the CCSO with Migliaccio from 1639 hours until Davis's arrival at 1722 hours.

The State's evidence does not support an objectively reasonable conclusion that obtaining a warrant was impractical. The State bears the burden of proving exigency.

3. This Court Should Apply the Rationale of Other State Cases to Migliaccio

Other courts with similar facts have likewise been convinced that there was no exigency justifying the warrantless blood test taken in those cases.

For instance, in *State v. Sanders*, 535 S.W.3d 891 (2017), the Court of Appeals of Texas held that a warrantless blood draw from the defendant was not justified by exigent circumstances. Sanders was traveling on the wrong side of the road in the evening when she struck a vehicle head-on resulting in the deaths of two individuals and serious injury to another. Trooper Russell received dispatch at 11:45 p.m. learning that the accident involved fatalities. It took Trooper Russell twenty minutes to arrive – 12:07 a.m. A great number of emergency responders were already at the scene. Russell made contact with Sanders and learned Sanders suffered broken bones. Russell detected the odor of alcohol and that Sanders had slurred speech and red, bloodshot eyes. Trooper Neff arrived shortly after. Sanders was transported by ambulance at 12:30 a.m. to the hospital which was five minutes away. While Russell was at the scene, a justice of the peace arrived but Russell did not discuss drawing Sanders's blood with the judge. There were other deputies as well as a game warden at the scene, and seven peace officers. No one accompanied Neff to the hospital with Sanders. The blood draw was ordered at 1:24 a.m. Neff had search warrant forms on his person but did not fill them out. Neff also did not believe he needed a warrant because a fatality had been involved. The Court found that this case was like in *Weems*, *infra*, where the arresting officer immediately observed that Weems had bloodshot eyes, slurred speech, and an inability to stand, and strong smell of alcohol, the same was true of Sanders. The officers knew that Sanders had been involved in an accident that resulted in multiple fatalities. Like in *Weems*, the transport to the

hospital did not involve a significant amount of time, only five minutes. Significantly, like in *Weems*, the record was devoid of the procedures that existed for obtaining a warrant and what the officer could have reasonably done to obtain a warrant. The Court found that a reasonable inference from the evidence is that during the more than one hour and fifteen minutes between the time Neff arrived on scene and observed Sanders exhibiting signs of intoxication and the time Neff signed the order to draw her blood, Neff never attempted to undertake one step toward procuring a warrant. The totality of the circumstances militates against a finding that practical problems prevented Neff from obtaining a warrant within a timeframe that prevented reliable evidence of blood alcohol content. The Court affirmed the suppression court's order granting Sanders's motion to suppress.

Like in *Sanders*, a warrantless blood draw from Migliaccio was not justified by exigent circumstances. Like in *Sanders*, when Trooper Davis arrived on scene, a great number of emergency responders and officers were already at the scene. Like in *Sanders*, officers on the scene immediately knew that there was evidence of alcohol based upon the two witness statements that Migliaccio had thrown an empty wine bottle from his car, the recovery of the wine bottle, and the detection of alcohol on Migliaccio's breath at the scene of the accident. Like the officers in *Sanders*, the officers in the current case knew that there had been a fatality. Like in *Sanders*, the transport from the scene of the accident to the hospital only took about five minutes. Like in *Sanders*, no other officer accompanied Trooper Davis to the hospital. Like in *Sanders*, where more than an hour and a half passed between the accident and the drawing of blood, officers never attempted to undertake one step toward procuring a warrant. Like in *Sanders* where officers could have consulted with a justice of the peace, Trooper Davis and other officers had communicated with State's Attorney Rappaport who could have assisted in the process of obtaining a warrant.

Like in *Sanders*, Trooper Davis did not seem to think he needed a warrant because a fatality had been involved. Like in *Sanders*, the totality of the circumstances militates against a finding that practical problems prevented Trooper Davis from obtaining a warrant within a timeframe that prevented reliable evidence of blood alcohol content. Like in *Sanders*, this Court should suppress the warrantless blood draw.

In *Weems v. State*, 434 S.W.3d 655 (2014), the Court of Appeals of Texas held that Texas's mandatory blood draw statute did not create a per se exception to the Fourth Amendment warrant requirement and the warrantless blood draw over the defendant's objection following arrest for DWI did not come within exigent circumstances exception to warrant requirement. Weems was responsible for a major automobile crash around midnight which required a passenger to be transported to the hospital by ambulance. *Id.* at 657-58. Weems fled the scene and was found hiding underneath a car. An officer found Weems and observed a strong odor of alcohol on his breath, bloodshot eyes, and he was unsteady on his feet and had slurred speech. *Id.* at 658. Weems was arrested and refused to provide a blood or breath sample. No field sobriety tests were performed because Weems was complaining of back and neck pains, thus he was transported to the hospital where a mandatory blood draw was taken. No warrant was procured for the blood draw. *Id.* The officer testified that the blood draw was taken because Weems was driving a car involved in a crash and the passenger was injured. Two to three hours passed between the time of the crash and the time of the draw because the hospital was busy with accident victims that night. The officer testified that there were other officers present at the scene. *Id.* at 666. The record did not contain information about procedures in place for obtaining a warrant or the availability of a magistrate judge. On the record, the warrantless blood draw was not justified by the exigency circumstances exception. *Id.*

Like in *Weems*, in Migliaccio there was a major automobile crash where there was a suspicion of alcohol almost immediately with the observation of odor of alcohol on his breath. No field sobriety tests were performed, and a mandatory blood draw was taken at the hospital without a warrant or consent. Like in *Weems*, the blood draw was taken because of the nature of the accident. Like in *Weems*, there were other officers present at the scene, the hospital was nearby, and no efforts were made to obtain a warrant.

In *City of Seattle v. Pearson*, 92 Wash.App. 802 (2016), the Court of Appeals of Washington held that the natural dissipation of THC concentration in the defendant's blood did not, alone, constitute exigent circumstances justifying a warrantless blood test. The evidence demonstrated that a serious motor vehicle accident occurred at 3:23 p.m., an officer first arrived on the scene at 4:06 p.m., the officer took Pearson to the hospital at 4:57 p.m. after she admitted she smoked marijuana earlier in the day, and a nurse drew her blood at 5:50 p.m. The record demonstrated that it can take between 60 to 90 minutes to obtain a warrant but that warrants can be secured via telephone, and that there are various judges to review and sign warrants. The Court of Appeals found that the City presented no evidence indicating why officers did not seek to obtain a warrant and that obtaining a warrant would have created a significant delay in collecting a blood sample. Even accepting that THC may dissipate within three to five hours, the record demonstrated that another officer could have transported Pearson to the hospital while the lead officer obtained a warrant, thereby minimizing or eliminating any delay. The Court noted that *McNeely* observes that the presence of other officers weighs against the conclusion that exigent circumstances exited. There were eight other officers beside the arresting officer at the scene of the accident. The accident happened on a Friday afternoon on a heavily travelled road in which another officer could have transported Pearson to the hospital. The delay, if any, would have been minimal. The Court

found that the City has the heavy burden to justify the warrantless search and that the City failed to show that the warrant process would significantly increase the delay before the blood test was conducted.

Like in *Pearson*, even with the natural dissipation of a substance in the blood, that alone does not constitute exigent circumstances justifying a warrantless blood test. Like in *Pearson*, the record demonstrates that another officer could have transported Migliaccio to the hospital while Trooper Davis obtained a warrant, thereby minimizing or eliminating any delay. Like in *McNeely*, the presence of other officers weighs against the conclusion that exigent circumstances exited. Like in *Pearson* that had eight other officers available, in Migliaccio's case there were dozens available. Like in *Pearson*, the accident happened on during the afternoon on a heavily travelled road in which another officer could have transported Migliaccio to the hospital. The delay, if any, would have been minimal. Like in *Pearson*, the State has the heavy burden to justify the warrantless search to show that the warrant process would significantly increase the delay before the blood test was conducted.

In *Gore v. State*, 451 S.W.3d 182 (2014), the Court of Appeals of Texas held that exigent circumstances did not exist to support a warrantless blood draw. On the evening of the 4th of July, Gore was involved in a minor traffic accident. A lead investigator arrived on scene and observed there were children in Gore's car. A family member was called to obtain the children which took between 15-25 minutes. Field sobriety tests were performed and Gore was read his statutory warnings associated with a blood draw which Gore refused. Gore was transported to a hospital where his blood was drawn at 12:34 a.m., 49 minutes after the investigation of the accident began. The officer did not believe that he had to get a search warrant in this kind of case and he discussed the arrest with an assistant district attorney. He testified that it normally takes two to four hours to

get a warrant in another county. An assistant district attorney in the current county testified that it normally takes two to three hours to get a warrant in the current county. The Court of Appeals did not find any exigency – at most there was a 25 minute delay to transfer custody of the children, there was no explanation more than one officer was affected by the delay, there was no explanation of why the officer did not feel he had time to get a warrant. Furthermore, it would seem that the assistant district attorney could have begun the process of obtaining a warrant while the officer continued with his investigation and arrest. There were ample judges available in the county that night. The Court found that testimony that it usually takes two to three hours to get a warrant as sufficient evidence of exigency in every DWI case would be to create a *per se* exigency rule, which *McNeely* expressly prohibits. Even if the officer had to wait three hours, the BAC evidence would have been available in light of its "predictable manner" of dissipation.

Like in *Gore*, Trooper Davis, and others had multiple phone conversations with the State's Attorneys' Office – not just any assistant state attorney – but the State's Attorney. Like in *Gore*, it would seem that the State's Attorney, or one of his assistants, could have begun the process of obtaining a warrant while Trooper Davis continued with the investigation. Like in *Gore*, there are ample judges available in the county at 4:25 p.m. to review warrant applications. Like in *Gore*, even if an officer had to wait hours to obtain a warrant, the BAC evidence would have been available in light of its "predictable manner" of dissipation. We know this both based on the science, as well as what occurred at this case. An hour and a half *after* the blood draw, at 7:42 p.m., Migliaccio blew a .10.

In *Commonwealth v. Trahey*, --A.3d-- (2020), 2020 WL 1932770, the Supreme Court of Pennsylvania held that the warrantless blood draw following arrest for DUI did not come within exigent circumstances exception to warrant requirement, under totality of circumstances. The

Friday of Labor Day weekend, an accident occurred at 9:15 p.m. but officers were not dispatched until 10:01 p.m. based on a standing order in which traffic accidents are deemed a low priority event for the City of Philadelphia, even though the bicyclist who was struck ultimately died. When the officers arrived at the scene, they made observations that Trahey was impaired. They spent 30 minutes at the scene before they transported him to the police station. During that transport they were called back to the scene where an officer who specializes in accidents involving critical injuries became concerned about the timing of the BAC test and at 10:49 p.m., sent Trahey to the police station for a blood test. In accordance with department policy, a blood test was drawn. No officer attempted to obtain a search warrant for the blood draw. A nurse drew the blood at 11:20 p.m. At the suppression hearing, the officers testified about the delay in arriving at the scene based on the policy of prioritizing events, about the number of officers available that night, as well as the process for obtaining a warrant and the timing which could take at best 75 minutes and at worst 3 hours. The suppression court did not find that exigencies existed, the Superior Court reversed, and the Supreme Court reversed the Superior Court. First, the intermediate court paid no heed to the availability of a breath test in this case which would have been less intrusive than a blood test. Second, if an expected inability to obtain a search warrant within two hours is sufficient to establish an exigency for warrantless blood draws, and given testimony that it may take over two hours in Philadelphia, then exigent circumstances would exist automatically for all DUI arrests in Philadelphia which would be a conclusion plainly in tension with *McNeely's* rejection of a *per se* exigency approach. The Court was sympathetic to time constraints for blood draws however any concerns about obtaining a warrant could have been ameliorated or wholly extinguished by the fact that no search warrant is necessary to demand that a DUI arrestee perform a breath test after *Birchfield.*

Like in *Trahey*, Trooper Davis gave no heed to the availability of a breath test in this case (if probable cause existed to arrest Migliaccio) which would have been less intrusive than a blood test. This would have wholly extinguished the need for a warrant and any time constraints. Like in *Trahey*, there cannot be a *per se* rule that creates an exigency in every DUI case in which it would take longer than two hours to draw blood in all DUI arrests because that would come in conflict with *McNeely*.

In *Sutherland v. State*, 436 S.W.3d 28 (2014), the Court of Appeals of Texas found that the exigent circumstances exception to the warrant requirement did not apply so as to justify warrantless blood draw from defendant. Sutherland was pulled over at 11:30 p.m. for failing to use his turn signal. He was asked to perform field sobriety tests and to provide a specimen of breath. He refused. Dispatch relayed that Sutherland had multiple previous convictions for driving while intoxicated so the officer transported Sutherland to the jail where a blood sample was taken without his consent and without a warrant at 12:48 p.m. The officer testified he was relying solely on the Texas Code requiring him to obtain a sample of blood when he learns an individual has been convicted two or more times of DWI. At the suppression hearing, a nighttime magistrate testified that a magistrate is available twenty-four hours a day in the basement of the jail, and that it would take between five and seven minutes for him to review an affidavit presented to him in support of a search warrant seeking a blood sample in a DWI case. The jail was approximately 2.6 miles from the traffic stop. The police department uses a system called "FASTER system" to facilitate quicker document assembly with information entered. On the record, the arresting officer was not faced with exigent circumstances such that the natural dissipation of alcohol from Sutherland's bloodstream would support a warrantless seizure of a specimen of his blood.

Like in *Sutherland*, a magistrate would have been available to review a warrant application, but Trooper Davis was relying solely on the Maryland code to obtain a sample within two hours when there is a fatality. Like in *Sutherland*, the courthouse, the Sheriff's Office and the State Police Barrack were all within minutes of one another. Like in *Sutherland*, on the record, Trooper Davis was not faced with exigent circumstances such that the natural dissipation of alcohol from Migliaccio's bloodstream would support a warrantless seizure of a specimen of his blood.

In *State v. Trahan*, 886 N.W.2d 216 (2016), the Supreme Court of Minnesota held that exigent circumstances did not exist so as to trigger an exception to the warrant requirement. This case began with a traffic stop at 12:34 a.m. of an erratic driver who was extremely agitated. The officer smelled a strong odor of alcohol, the driver had red and watery eyes, and had difficulty standing. The officer did not perform sobriety tests and placed Trahan under arrest. Trahan was advised of the implied consent law to submit blood or urine. The officer did not have a warrant. At 2:40 a.m. Trahan provided a urine sample which the officer believed had been tampered with. The officer requested a blood test which Trahan refused. Trahan was charged with refusing to submit to the blood test. The Supreme Court found that there was no exigency because the refusal did not occur until two hours after the traffic stop, indicating no real urgency and that the two hour time frame had already expired. There were no concerns about Trahan's immediate availability for testing because Trahan was still at the jail when the officers requested he submit to a blood test.

Like in *Trahan*, the officer detected the scent of alcohol early on but the officer did not obtain a warrant for a blood draw. Like in *Trahan*, a significant period of time elapsed where Migliaccio was just sitting at the CCSO prior to being required to submit to a blood time – precious time in which officers could have been securing a warrant and suggesting that there was no real urgency in obtaining the blood draw.

In *State v. Townsend*, 160 Idaho 885, 380 P.3d 698 (2016), the Court of Appeals of Idaho held that the warrantless blood draw was not justified by exigent circumstances even though the officer testified that it would have taken at least one hour and 30 minutes to obtain a warrant. At 1:30 a.m., a truck was pulled over for driving the wrong way down a street. The driver had just left a bar and appeared to be under the influence of alcohol. A second officer arrived ten minutes later. Townsend was advised of penalties for refusing to submit to evidentiary testing and gave insufficient breath for the breath tests. Townsend was transported to a jail where a paramedic drew blood samples from him at 3:00 a.m. The officer submitted an affidavit that obtaining a warrant would take no less than one hour and thirty minutes and that telephonic and expedited warrants were not available. The Court of Appeals however found that a magistrate was on call to issue warrants but that neither officer *attempted* to secure a warrant. Thus, while the process would have been delayed, there is no indication the officers could not have reasonably obtained a warrant to draw Townsend's blood and *McNeely* makes clear that a police officer must obtain a warrant when it is reasonable to do so. The Court found that whether the defendant renders a valid and reliable breath test to determine his alcohol concentration is not a relevant factor for determining whether an exigency justifies a warrantless blood draw, because if this were true, then an exigency would exist every time a driver failed to blow at or above a .08, so long as the test was performed before the telephonic and expedited warrants were available. *McNeely* expressly prohibits such categorical rules. The officer's failure to attempt to obtain a warrant also factors against an exigency.

Like in *Townsend*, the officers never attempted to secure a warrant and an exigency cannot exist merely because the delay to obtain a warrant delays the timeframe to obtain the blood draw.

In *Colura v. State*, 510 S.W.3d 218 (2016), the Court of Appeals of Texas held that the warrantless blood draw following the defendant's arrest for driving while intoxicated (DWI) did not come within the exigent circumstances exception to the warrant requirement. Colura was stopped at midnight for driving in a manner suggesting he was intoxicated. Colura displayed signs of impairment and submitted to the HGN test, exhibiting six clues. Colura did not complete the other tests and was placed under arrest. Colura refused to provide a voluntary blood draw. Colura was transported to the hospital 15 minutes after that where a warrantless blood draw was performed, the officer not believing that a warrant was necessary under the circumstances. In finding that the exigent circumstances exception was not met, the Court noted that the record did not show that an officer was unavailable to assist the arresting officer. The record did not contain any explanation for the failure to obtain a warrant because of an anticipated delay that would have jeopardized the ability to obtain evidence of intoxication.

Like in *Colura*, Trooper Davis did not seem to believe that a warrant was necessary. Like in *Colura*, the record does not show that another officer was unavailable to assist the arresting officer.

4. Conclusion

At the time that Trooper Davis ordered the warrantless taking of Migliaccio's blood less than twenty minutes had elapsed since the time of Migliaccio's arrest. It was only two to three miles between the scene of the accident, the CCSO, the Maryland State Police Barracks, the Circuit Court building where both the judges' chambers and the prosecutors' offices were located and the travel time to CalvertHealth was under ten minutes. All events occurred during the business day. There were literally dozens of law enforcement officers available to assist in the investigation.

The prosecutor was available and, in fact, had spoken to a number of the law enforcement officers involved in the investigation.

When interviewed, a number of the Deputies indicated that while they offered to assist, they were advised either they could go back to off-duty status or continue with their routine assignments.

It is clear that a warrant was feasible and clearly could have been obtained in a timely fashion.

Not only were there experienced investigators involved in this matter, but the drafting of a search warrant would have been a relatively simple matter, assuming, *arguendo,* that a judge determined that there was probable cause to justify the issuance of a search warrant (a fact that Migliaccio does not concede) for Migliaccio's blood. The discovery provided in this matter establishes that the S.O.T. already was preparing to execute a search warrant that afternoon and that one of its members was on the way to the CCSO to prepare/execute the search warrant when that operation was cancelled. Clearly there were Deputies available to obtain a search warrant as that process had already been underway, albeit with respect to another matter.

There were ample law enforcement officers at the scene of the accident to attend to what was necessary to investigate the accident. There were many Deputies at the CCSO not engaged in specific assignments. A review of the numerous witness statements provided by a number of Deputies further confirms that there were ample available personnel to obtain a search warrant.

This is not an instance where an effort was made to begin the process of obtaining a search warrant and time expired. There was simply no effort to start the process of obtaining a search warrant. A quick, almost apparently knee-jerk decision was clearly made to forgo any attempt to

secure a search warrant and Migliaccio was taken directly to the hospital where blood was promptly drawn.

It is clear that there was no lack of medical personnel that required prompt, warrantless action. The blood was drawn during the normal business day, at a large hospital, within minutes of Migliaccio's arrival at the hospital.

Unlike some cases where individuals were seriously injured, unconscious or otherwise not able to consent to the blood draw, here Migliciaccio's physical condition did not require warrantless action by the police.

Simply put - this was a warrantless draw of Migliaccio's blood without any attendant exigency to justify acting without a warrant.

IV. T.A. § 16-205.1 IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED TO MIGLIACCIO'S CASE.

As stated *supra*, T.A. § 16-205.1(a)(2) is the "implied consent" provision in which:

> [A]ny person who drives…a motor vehicle on a highway…in this State is deemed to have consented, subject to the provisions of §§ 10-302 through 10-309, inclusive, of the Courts and Judicial Proceedings Article, to take a test if the person should be detained on suspicion of driving…while under the influence of alcohol, while impaired by alcohol…

T.A. § 16-205.1(c)(1) applies to testing of persons involved in a motor vehicle accident:

> If a person is involved in a motor vehicle accident that results in the death of…another person and the person is detained by a police officer who has reasonable grounds to believe that the person has been driving…while under the influence of alcohol, while impaired by alcohol,…the person shall be required to submit, as directed by the officer, to a test of:
>
> (i) The person's breath to determine alcohol concentration;
> (ii) One specimen of the person's blood, to determine alcohol concentration…or
> (iii) Both…

It is evident that Trooper Davis and State's Attorney Rappaport were operating pursuant to T.A. § 16-205.1(a)(2) and its attendant provisions because they ensured that Migliaccio's blood was drawn within two hours, C.J.P § 10-303(a)(2); two vials of blood were drawn, T.A. § 16-205.1(a)(1)(ii); and Migliaccio was told that he could not refuse the test due to the nature of the accident, T.A. § 16-205.1(c)(1).

While the State certainly has the ability to condition the right to drive on consent to a blood draw, it cannot require the waiver of a constitutional right in return. One may be asked to relinquish the privilege of driving as a result of the failure to consent, but one may not be asked to relinquish other constitutionally guaranteed rights. *See So.Pac. Co. v. Denton*, 146 U.S. 202, 207 (1892) ("But that statute requiring the corporation, as a condition precedent to obtaining a permit to do business within the State, to surrender a right and privilege secured to it by the constitution and the laws of the United States, was unconstitutional and void[.]").

The implied consent statutes only require "reasonable grounds" which means "'reasonable articulable suspicion' and not preponderance of the evidence or probable cause." *MVA v. Shepard*, 399 Md. 241, 254 (2007). The implied consent/mandatory blood draw statutes are facially unconstitutional because they mandate a blood draw based on upon reasonable suspicion by a police officer, not probable cause; they forgo the requirement of a neutral magistrate acting as a barrier between the suspect and the police; and they do not require any exception to the warrant requirement to be met. The statutes are merely a *per se* exception to the warrant requirement based on a category of drunk driving cases that result in death or serious bodily injury.

In *Missouri v. McNeely*, 569 U.S. 141 (2013), the Supreme Court forbid categorical, *per se* exceptions to the warrant requirement. T.A. §§ 16-205.1(a)(2) and (c)(1) are unconstitutional because they do not allow implied consent to be withdrawn and therefore do not meet the

requirements for voluntary consent under the Fourth Amendment and Maryland Declaration of Rights. The State cannot condition the exercise of a privilege granted by the State upon the waiver of constitutional rights.

In *Birchfield v. North Dakota*, --U.S.--, 136 S.Ct. 2160, 2184-86 (2016), the Supreme Court went one step further holding that an officer cannot require a warrantless blood test unless the officer has probable cause to require the blood test and demonstrates exigent circumstances.

The constitutionality of Maryland's implied consent statute was challenged once before in *Colbert v. State*, 229 Md. App. 79 (2016), and the Court of Special Appeals held that the statute authorizing warrantless tests of a driver in a motor vehicle accident resulting in death was a reasonable *per se* exception to the warrant requirement and that **breath tests** were admissible under the statute. The *Colbert* Court adopted the *Marks* Rule, approving of Justice Kennedy's concurrence to *McNeely* which allows States to define categories of cases in which warrants are not required, which the Court of Special Appeals believed Maryland's implied consent statute fell into. However, the posture of *Colbert* changed before the opinion issued because *Birchfield* was decided approving of a *per se* rule allowing warrantless breath (but not blood) tests incident to drunk driving arrests. The Court of Special Appeals did not have to decide whether the implied consent statute would be constitutional in the context of a warrantless blood draw because the *Colbert* case was confined to a breath test. The *Colbert* Court wrote: "*Birchfield* places great emphasis on a distinction it draws between the bodily intrusion involved in a breath test and that involved in a blood test. *Birchfield*, 136 S. Ct. at 176. We take no position on the constitutionality of the administration of a blood alcohol test pursuant to TR § 16-205.1(c)." *Colbert*, 29 Md. App. at 81, n.1. The Court of Special Appeals made it clear that the facts in that case related to a breath test, not a blood test.

Migliaccio takes the position that both *McNeely* and *Birchfield* make T.R. § 16-205.1(c) unconstitutional because there cannot be a *per se* exception to the warrant requirement for blood tests. T.R. § 16-205.1(c) is based solely upon an officer's finding of "reasonable grounds" and not "probable cause." Other states have similarly found that there cannot be a *per se* exception for blood tests.

In *State v. Wulff*,157 Idaho 416, 337 P.3d 575 (2014), the Supreme Court of Idaho overruled its prior cases to the extent that they applied Idaho's implied consent statute as an irrevocable per se rule that constitutionally allowed forced warrantless blood draws. Idaho's laws did not allow the driver to revoke his implied consent. The Court held that the district court properly concluded that Idaho's implied consent statute was not a valid exception to the warrant requirement because *McNeely* prohibits per se exceptions to the warrant requirement.

In *Stewart v. State*, 442 P.3d 158 (2019), the Court of Criminal Appeals of Oklahoma held that more than simple compliance with the statute requiring nonconsensual blood testing of driver involved in accident is required in order to justify warrantless seizure of blood from an intoxicated driving suspect, overruling prior cases. This is because a blanket rule in a statute that substitutes one per se rule of exigency for another is at odds with the central point of *McNeely* and will not satisfy the Fourth Amendment requirement of individualized consideration of the existence of probable cause and exigent circumstances to justify the taking of a blood sample from a driver without a warrant.

Respectfully, this Court should find that Maryland's implied consent statute is both unconstitutional on its face, as well as applied to Migliaccio.

V. THE RESULTS OF A COMPELLED BREATHALYZER TEST ARE INADMISSIBLE AGAINST MIGLIACCIO IN A CRIMINAL PROCEEDING.

After the warrantless blood draw at the hospital, Migliaccio was transported back to the CCSO and ordered by his superiors in the CCSO to take a breathalyzer test for their internal affairs investigation. Present were Migliaccio's direct supervisor, Sgt. Elliott and Professional Standards Bureau Captain Ireland. As a result of the breath test, Migliaccio was suspended from his law enforcement duties and surrendered his firearm and badge.

Not only was the breathalyzer the product of a period of unlawful detention and the results of a non-consensual search in violation of the Fourth Amendment to the United States Constitution and the Maryland Declaration of Rights but the results of a compelled breathalyzer test are statutorily inadmissible pursuant to provisions of the Law Enforcement Officers' Bill of Rights ("LEOBR").

Public Safety Article ("P.S.") 3-104(l) provides that:

> Tests and Examinations - in general
>
> (l)(1) The law enforcement agency may order the law enforcement officer under investigation to submit to blood alcohol tests, blood, breath, or urine tests for controlled dangerous substances, polygraph examinations, or interrogations that specifically relate to the subject matter of the investigation.
>
> (2) If the law enforcement agency orders the law enforcement officer to submit to a test, examination, or interrogation described in paragraph (1) of this subsection and the law enforcement officer refuses to do so, the law enforcement agency may commence an action that may lead to a punitive measure as a result of the refusal.
>
> (3) If the law enforcement agency orders the law enforcement officer to submit to a test, examination, or interrogation described in paragraph (1) of this subsection, **the results of the test, examination, or interrogation are not admissible or discoverable in a criminal proceeding against the law enforcement officer.**
>
> (emphasis added).

The results of the compelled breathalyzer test are not admissible for any purpose in the prosecution of this matter.

Despite the clearly compelled nature of the test and the statutory bar to the admission of such evidence, the State has advised Migliaccio that it reserves the right to seek to introduce such evidence for purposes of impeachment or as rebuttal evidence.

It is clear from the protections provided by LEOBR that information acquired as a result being ordered, under threat of termination or other adverse job action, cannot be used "in a criminal proceeding against the law enforcement officer."

REQUEST FOR A HEARING

Migliaccio respectfully requests that this Honorable Court schedule an evidentiary hearing on his motion to suppress evidence.

SUMMARY AND CONCLUSION

It is respectfully requested that this Honorable Court grant Migliaccio's Motion to Suppress blood test evidence, breathalyzer test results and any physical evidence, statements or other evidence obtained directly or derivatively as a result of the unlawful arrest/detention and searches of Migliaccio.

Migliaccio respectfully requests that the Honorable Court conduct an evidentiary hearing in this matter at which the State must establish lawful and constitutional justification for its seizure and acquisition of any blood test and/or breathalyzer tests, personal property of Migliaccio and statements made by Migliaccio.

Respectfully submitted,

MARCUSBONSIB, LLC

/s/ Robert C. Bonsib

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CERTIFICATE OF EXCLUSION OF RESTRICTED INFORMATION

I HEREBY CERTIFY, pursuant to Maryland Rule 20-201, that this filing excludes any restricted information.

/s/ *Robert C. Bonsib*

ROBERT C. BONSIB

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing motion was filed, via electronic filing, this 16th day of June, 2020, to: Special Assistant States Attorney Steven Kroll.

/s/ Robert C. Bonsib

ROBERT C. BONSIB